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Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 38

POLAR ICE CREAM & CREAMERY COMPANY,
Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida,
Appellees.

JURISDICTIONAL STATEMENT.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. .....

POLAR ICE CREAM & CREAMERY COMPANY,
Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida,
Appellees.

JURISDICTIONAL STATEMENT.

The opinion of the Three-Judge Court, District Court of the Northern District of Florida, dated July 26, 1962, does not appear to have been reported as of this date. A copy of the opinion is contained in the Appendix to this Statement.

Jurisdiction of the Supreme Court of the United States is invoked by reason of the following:

This is a direct appeal to the Supreme Court of the United States from an Order of a Three-Judge Court

denying, after notice and hearing, a permanent injunction in a civil action required by Title 28, Section 2281, U. S. Code, to be heard by a District Court of Three Judges. The Appeal is brought pursuant to Title 28, U.S.C. 1253.

The Judgment or Decree sought to be reviewed was entered on July 26, 1962. The Notice of Appeal was filed on September 21, 1962, in the United States District Court for the Northern District of Florida.

The statutory provision believed to confer on the Supreme Court of the United States jurisdiction of this Appeal is Title 28, U.S.C., Section 1253.

Cases believed to sustain the jurisdiction are as follows:

Parker v. Brown, 317 U.S. 341; 87 L.Ed. 315; 62 S. Ct. 367;

Morey v. Doud, 354 U.S. 457; 1 L.Ed.2d 1485; 17 S. Ct. 1344;

Florida Lime & Avocado Growers v. Jacobsen, 362 U.S. 73; 4 L.Ed.2d 568; 80 S. Ct. 568;

Louisiana v. National Association for the Advancement of Colored People, 366 U.S. 293; 6 L.Ed.2d 301; 81 S.Ct. 1333;

Braunfeld v. Brown, 366 U.S. 599; 6 L.Ed.2d 563; 81 S.Ct. 1144;

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The validity of Chapter 501, Florida Statutes, 1961, is involved. It may be found in Volume 2, Page

2220, The Official Florida Statutes, 1961. The provisions of this statute are set forth in an Appendix to this Statement.

(1) The questions presented by this Appeal are as follows:

(a) Whether Chapter 501, Florida Statutes, and all orders arising thereunder are unconstitutional and are in violation of Article I, Section 8, Clause 3 (Commerce Clause) of the Constitution of the United States, in that commerce between the states is burdened unduly by the application of said statute and orders complained of.

(b) Whether Chapter 501, Florida Statutes, and all rules, regulations and orders issued thereunder, insofar as the same pertain to milk sold to an agency of the United States of America and delivered on military reservations exclusive jurisdiction to which has been ceded to the United States of America in accordance with Article I, Section 8, Clause 17, of the Constitution of the United States, violate Article VI, Clause 2 (Supremacy Clause) of the Constitution of the United States.

(c) Whether Chapter 501, Florida Statutes, and all rules, regulations and orders issued thereunder, insofar as the same pertain to milk sold to an agency of the United States of America and delivered on military reservations exclusive jurisdiction to which has not been ceded to the United States of America, place a prohibition on the Federal Government and therefore so conflicts with Federal Procurement statutes and policy (Armed Services Procurement Act of 1947, 62 Stat.

22, 10 USC, Section 2301, et seq.) as to be invalid under the Supremacy Clause, Article VI, Section 2, of the Constitution of the United States.

(d) Whether Chapter 501, Florida Statutes, is unconstitutional and is violative of the Fourteenth Amendment to the Constitution of the United States in the following respects:

(1) That it deprives the Plaintiff of property without due process of law.

(2) That it denies to the Plaintiff equal protection of the law.

(3) That it discriminates unreasonably, arbitrarily and oppressively against the Plaintiff.

A Complaint was filed by the Plaintiff, which is now Appellant, in the United States District Court for the Northern District of Florida, which contained a Prayer for a Temporary Restraining Order and a Prayer that a Three-Judge Court should determine the action or proceeding in accordance with Title 28, U.S.C., Section 2284, and there was contained the further prayer that a permanent injunction should issue, and that Chapter 501, Florida Statutes, and all orders issued pursuant thereto, be declared to be null and void, unconstitutional and of no effect, and that the Plaintiff be granted such other and further relief as the Court should deem appropriate.

A Temporary Restraining Order was thereafter issued, and an Amended Complaint was filed, which adopted the Prayer contained in the original Complaint, and also attacked certain orders of the Florida

Milk Commission issued pursuant to the authority granted it by the provisions of Chapter 501, Florida Statutes, 1961. Copies of the specific orders were attached to the Amended Complaint and made a part thereof. The orders were attacked on the grounds that they were unconstitutional in that they were in violation of Article I, Section 8, Clause 3, of the Constitution of the United States; that the orders, insofar as they pertained to milk sold to an agency of the United States of America and delivered on military reservations, exclusive jurisdiction to which has been ceded to the United States of America in accordance with Article I, Section 8, Clause 17, of the Constitution of the United States, violates Article VI, Clause 2, of the Constitution of the United States, and that Chapter 501, Florida Statutes, and all orders issued pursuant thereto, were unconstitutional and were violative of the Fourth Amendment to the Constitution of the United States.

The Appellant company is a milk distributor whose plant is located in the State of Florida sixteen miles from the Alabama state line. Under the Florida Milk Commission, a base system was instituted whereby each Florida producer who sold milk to the Appellant was allocated a certain percentage of Class I sales, which are sales of fluid milk for human consumption, and the base percentage was computed to require the Appellant to take all milk produced by its Florida producers and to use it for Class I sales before it could purchase any out-of-state milk and use the same in Class I sales, thus insulating the Florida producers

and requiring the highest price to be paid for Florida milk. The Administrator of The Florida Milk Commission admitted that the base allocation would give Florida milk producers preferential treatment, as compared with producers in Alabama or in other states. Even though Alabama milk of comparable quality could be purchased for 40¢ per gallon, or less, the Appellant would be forced to take the Florida milk and pay 61¢ per gallon for it, if the same were used for human consumption. The Appellant had various government contracts, one of them being with Fort Benning, Georgia, for the furnishing of milk of a value of more than $1,000,000.00, and the contract provided that the same be supplied by Appellant at a cost delivered to Fort Benning, Georgia, of 58¢ per gallon. Likewise, there was a tax imposed by the Statute of .15 of one cent upon each gallon of milk distributed by each distributor during each month. The tax, under the orders of the Florida Milk Commission, would be collected on milk delivered to military installations, exclusive jurisdiction to which had been ceded to the United States of America, and it was contended in the Court below by the Appellant that the tax violated the Supremacy Clause of the Constitution of the United States, and that the orders of the Florida Milk Commission, together with the statutory requirements as applied to the Appellant, were unconstitutional, violated the Commerce Clause of the Constitution of the United States, and also violated the Fourteenth Amendment to the Constitution of the United States.

The Appellant also had military contracts for delivery on military bases located on property exclusive jurisdiction to which had not been ceded to the United States. From the testimony, it was developed that Florida producers received 61¢ per gallon for milk under the orders of the Florida Milk Commission, which was the highest price paid for milk in the United States, and that milk from Alabama of the same quality could be purchased for 34½¢ per gallon. The evidence further showed that there was no emergency insofar as a supply of milk was concerned, and that milk and dairy products were in extreme surplus which continued to grow, and that the Government bought, in the surplus price support program, between April, 1961, and February 8, 1962, 1,300,000,000 pounds of dairy products.

The purity and wholesomeness of milk is regulated outside the jurisdiction of The Florida Milk Commission and is not a subject covered under Chapter 501, Florida Statutes, 1961.

Appellant submits that the questions presented are so substantial as to require plenary consideration, with briefs on the merits, and oral argument for their resolution for the following reasons:

1. Chapter 501, Florida Statutes, 1961, was originally passed during the Depression years, when milk was in scarce supply, and it was necessary, in order to insure an adequate supply of milk for the health and welfare of its people. Now milk is greatly in surplus. Yet, the entire Milk Act was designed to protect,

isolate and insulate the Florida milk producers from competition with milk producers outside the State of Florida and to require milk distributors to pay to Florida producers a price which, at the time of the trial of this case, was the highest price in the United States, even though milk of the same quality and purity could be bought in the State of Alabama, just sixteen miles away, for little more than one-half the Florida price. By the same token, the distributor appellant sold milk in the City of Pensacola which it was forced to purchase at 61¢ per gallon from its Florida producers in direct competition with Alabama milk which could be purchased in Alabama for 40¢ per gallon and distributed in Pensacola, Florida.

2. A base system was established by order of the Florida Milk Commission and appears as Exhibit "L" to the Amended Complaint of Appellant, which awarded all of the Florida producers of Appellant a percentage of the Class I sales of Appellant. The total percentage was 100%, thus requiring that Florida producers would receive preferential treatment, and Appellant was forced to pay the price of 61¢ per gallon for all Florida milk, if it sold more gallons than their aggregate production in Class I sales. The base also is expressed in a percentage ratio, rather than on a gallonage basis. Thus, if the gallonage of Florida producers increased, the Appellant, nevertheless, would have to take an ever-increasing amount of this milk and pay 61¢ per gallon for it, even though Alabama milk, or milk from other states of comparable quality and purity, could be purchased for 40¢ per gallon, or

less. Also, the Appellant distributor does not have the right to terminate the contractual relationship created solely by the Florida Milk Commission, except by showing just cause acceptable to the Florida Milk Commission. (*Section 501.05, Florida Statutes, 1961*).

3. *Section 501.13, Subparagraph 8, Florida Statutes, 1961*, contains virtually the exact language that was struck down in the case of *Baldwin v. Seelig, 294 U.S. 511, 79 L.ed. 1032*, which is as follows:

> "It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this chapter respecting such milk so produced shall apply and the powers conferred by this chapter on the commission shall attach. After any milk so produced comes to rest within the state, any sale, within the state by a licensed milk dealer required by this chapter to be licensed, or any milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions is unlawful."

4. Under the orders and regulations of the Florida Milk Commission, as administered, the Appellant would be required to pay 61¢ per gallon for any Florida milk delivered to a military installation, either within or without the State of Florida, and whether on a military reservation exclusive jurisdiction to which had been

ceded to the United States of America or not. The Appellant has a number of military contracts, wherein it agreed to deliver packaged, bottled milk to the reservation at a price of 58¢ per gallon, which contracts were executed prior to the time the Pensacola area in which distributor's plant is located came under the jurisdiction of the Florida Milk Commission.

5. A tax of 15¢ per 100 gallon is imposed for each gallon of Florida milk sold and delivered, even to a military installation exclusive jurisdiction to which had been ceded to the United States of America, thus by both the required price of 61¢ per gallon, and the imposition of the tax, violate the Supremacy Clause, Article VI, Section 2, of the Constitution of the United States, and conflict with Federal Procurement statutes and policies (*Armed Services Procurement Act of 1947, 62 Stat. 22, 10 U.S.C., Section 2301, et seq.*).

Furthermore, it is clear that there is no emergency which requires the police power of the State of Florida to be invoked, so as to regulate the production, price and distribution of milk, in view of the tremendous surplus in the whole milk industry, and the attempt so to do constitutes an undue burden on commerce between the States, in violation of the Constitution of the United States. The testimony was undisputed that if every one of the Florida milk producers were to go out of the milk business, citizens of the Pensacola area would not "miss the milkman". This is true because of the advance made in transportation facilities, so that milk from northwestern Wisconsin can be delivered in thirty-six hours to

Pensacola, Florida, which would meet all necessary health requirements for distribution within the State of Florida.

From the foregoing, it is apparent that the statute and orders and regulations issued pursuant thereto violate *Article I, Section 8, Clause 3, of the Constitution of the United States*, by not only fixing the price of milk moving in Interstate Commerce, but also, it sets up an economic barrier within the State of Florida and is violative of the Fourteenth Amendment to the Constitution, in that it deprives the Appellant of property without due process of law, denies to Appellant equal protection of the law, and discriminates unreasonably, arbitrarily and oppressively against the Appellant.

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By .....
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PROOF OF SERVICE.

I, JOE J. HARRELL, one of the attorneys for POLAR ICE CREAM & CREAMERY COMPANY, Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17 day of November, 1962, I served a copy of the foregoing Jurisdictional Statement, together with Appendix, on the several parties hereto by mailing a copy in a duly addressed envelope, airmail, postage prepaid, to their respective attorneys of record, as follows: MALLORY E. HORNE, of Horne & Rhodes, 102½ South Monroe Street, Tallahassee, Florida, Attorneys for Charles O. Andrews, Jr., Chairman, Alex Shaw, Jackson Logan, Robert G. Carter, Mrs. Charlotte Tomlinson, John H. Cone, and Dr. James Acree, as and constituting the Florida Milk Commission, and Florida Milk Commission, an instrumentality of the State of Florida.

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